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Postar Coal Company, Inc. and United Mine Workers of America, AFL–CIO. Case 9–CA–43865

September 25, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAMBER AND MEMBER LIEBMAN

Upon a charge filed on September 13, 2007, by the Charging Party, United Mine Workers of America, AFL–CIO (the Union), the General Counsel of the National Labor Relations Board issued a complaint on November 29, 2007, alleging that the Respondent, Postar Coal Company, Inc., violated Section 8(a)(5) and (1) of the Act by failing to provide health insurance coverage to laid-off unit employees established pursuant to the provisions of article XX of the National Bituminous Coal Wage Agreement of 2002, as extended by a March 22, 2007 memorandum of understanding. Copies of the charge and complaint were served on the Respondent. The Respondent filed a timely answer denying the commission of any unfair labor practices.

On February 25, 2008, the General Counsel, the Respondent, and the Union filed with the Board a joint motion and stipulation of facts. The parties agreed that the charge, complaint, answer, stipulation of facts, statement of issues presented, and each party’s statement of position shall constitute the entire record in this case and that no oral testimony was necessary or desired by any party. The parties waived a hearing, findings of fact, conclusions of law, and issuance of a recommended Order by an administrative law judge, and stated that they wished to submit this case directly to the Board for findings of fact, conclusions of law, and an Order.

On August 14, 2008, the Deputy Executive Secretary, by direction of the Board, issued an Order approving the stipulation and transferring the proceeding to the Board. The General Counsel thereafter filed a brief, and the Union stated that it would rely on its previously-submitted statements of position in lieu of filing additional briefs. The Respondent did not file a brief in response to the August 14 Order.

On the entire record and the briefs, the Board¹ makes the following

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board’s powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation that engaged in the operation of a coal mine known as Postar No. 1 located near Cucumber, West Virginia, where it purchased and received goods valued in excess of \$50,000 directly from points outside West Virginia. The parties have stipulated, and we find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Factual Background

The Union has represented a bargaining unit including the Respondent’s employees at the Postar No. 1 mine since 1992. The most recent contract covering unit employees at this mine was the National Bituminous Coal Wage Agreement of 2002 (NBCWA), which expired on December 31, 2006. On January 1, 2003, the Respondent signed a memorandum of understanding with the Union solely as an independent signatory contractor. This memorandum was attached to and made part of the 2002 NBCWA.

The health insurance plan included in article XX of the 2002 NBCWA provided for benefits for a laid-off employee for up to a year if the covered employee worked 2000 hours in 24 consecutive months immediately prior to the layoff. On March 22, 2007, the parties entered into another memorandum of understanding (MOU) extending the terms of the expired NBCWA to May 1, 2007, unless mining was complete before that date and/or the mine had been abandoned and was in the process of being sealed in accordance with Mine Safety and Health Administration regulations. The Respondent had previously informed the Union that the Postar No. 1 mine would be mined out and shut down in 2007.

The Respondent ceased operations at Postar No. 1 on about May 8, 2007, and laid off all unit employees. On June 1, the Respondent sent letters to the laid-off employees advising them of the discontinuation of their health benefits effective June 30, 2007. The Respondent failed to give the Union notice and an opportunity to bargain about this action and has failed to provide health care benefits to laid-off unit employees since June 30.

B. The Parties’ Contentions

The General Counsel and the Union contend that, under the NBCWA, as extended by the parties’ 2007 MOU,

issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

the Respondent was required to provide health benefits to a laid-off employee for up to a year if the covered employee worked 2000 hours in 24 consecutive months immediately prior to the layoff. When the Respondent discontinued health benefits for all laid-off employees effective June 30, 2007, claiming an inability to pay, it violated Section 8(a)(5) and (1) of the Act, inasmuch as a financial inability to pay is no defense of unilateral conduct. To remedy this violation, the General Counsel maintains that interest on monetary awards to the employees for losses resulting from the Respondent's action should be compounded on a quarterly basis.

The Respondent does not deny its obligation to provide health benefits to laid-off employees for up to 1 year. It argues that it failed to continue providing these benefits because it was no longer able to pay for them. The Respondent states that its financial distress was further evidenced when it filed for bankruptcy on January 11, 2008.

III. DISCUSSION

We find merit in the complaint's allegation that the Respondent violated the Act. The NBCWA, as extended by the March 22, 2007 MOU, provided that laid-off employees who worked the required number of hours preceding their layoff should continue to receive health insurance benefits for up to a year. Consequently, qualified employees laid off on May 8, 2007, would be entitled to receive these benefits until as late as May 8, 2008. Health care benefits are a mandatory subject of bargaining. The Respondent's undisputed unilateral cessation of these benefits for laid-off employees was therefore unlawful. *Hen House Market No. 3*, 175 NLRB 596, 602 (1969), *enfd.* 428 F.2d 133 (8th Cir. 1970) (unilateral change in contractually provided health benefit plan after contract expiration violates Section 8(a)(5)).²

The Respondent's only asserted defense is that it was no longer financially able to provide the benefits. However, a financial inability to pay does not constitute an adequate defense to an allegation that an employer has violated Section 8(a)(5) of the Act by failing to maintain established terms and conditions of employment. E.g., *The Pantry Restaurant*, 341 NLRB 243, 244 (2004), *citing Convergence Communications, Inc.*, 339 NLRB 408 (2003). Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing to continue in effect established terms and conditions of employment by unilaterally discontinuing

health care coverage of its laid-off unit employees, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, we shall order the Respondent to give effect to the existing terms and conditions established under its collective-bargaining agreement with the Union regarding the provision of health insurance coverage for laid-off employees by making whole unit employees for any expenses they may have incurred due to the unilateral cessation of health benefit coverage, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), *enfd. mem.* 661 F.2d 940 (9th Cir. 1981), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).³

Further, inasmuch as the Respondent closed its mine and laid off all employees on May 8, 2007, prior to its unlawful cessation of health benefits for laid-off employees on June 30, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of unit employees possibly affected by this unlawful conduct. This would include all unit employees employed on and after July 1, 2006.

ORDER

The National Labor Relations Board orders that the Respondent, Postar Coal Company, Inc., Cucumber, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with the Union, as the exclusive bargaining representative of the following unit of the Respondent's employees, by unilaterally discontinuing terms and conditions of employment relating to the provision of health insurance benefits for laid-off employees:

All employees engaged in the production of coal, including the removal of overburden and coal waste, preparation, processing, and cleaning of coal, and transportation of coal (except by waterway or rail), repair and maintenance work normally performed at the mine site or at a central shop of Respondent; and main-

² See generally *NLRB v. Katz*, 369 U.S. 736 (1962), and *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991).

³ We deny the General Counsel's request for compound interest computed on a quarterly basis for any monetary amounts owing to the laid-off unit employees. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Glen Rock Ham*, 352 NLRB No. 69, slip op. at fn. 1 (2008), *citing Rogers Corp.*, 344 NLRB 504 (2005).

tenance of gob piles, and mine roads, and work of the type customarily related to all of the above; but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Give effect to the terms of health insurance coverage for laid-off unit employees that existed prior to their unlawful discontinuance on June 30, 2007.

(b) Make whole, in the manner set forth in the remedy section of this decision, unit employees for any losses, plus interest, resulting from the Respondent's failure to maintain in effect existing terms for health insurance coverage for laid-off employees.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, mail copies of the attached notice marked Appendix,⁴ at its own expense, to the Union and to all employees who were employed by the Respondent at its Postar No. 1 mine in Cucumber, Virginia, on or after July 1, 2006. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 25, 2008

Peter C. Schaumber,	Chairman
Wilma B. Liebman,	Member

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES MAILED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively with the United Mine Workers of America, AFL-CIO (the Union), as the exclusive bargaining representative of the below unit of our employees at the Postar No. 1 mine, by unilaterally discontinuing terms and conditions of employment relating to the provision of health insurance benefits for laid-off employees:

All employees engaged in the production of coal, including the removal of overburden and coal waste, preparation, processing, and cleaning of coal, and transportation of coal (except by waterway or rail), repair and maintenance work normally performed at the mine site or at a central shop of Postar Coal Co., Inc.; and maintenance of gob piles, and mine roads, and work of the type customarily related to all of the above; but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL give effect to the terms of health insurance coverage for laid-off unit employees that existed prior to our unlawful discontinuance of health benefits on June 30, 2007.

WE WILL make whole unit employees for any losses, with interest, resulting from our failure to continue in effect existing terms for health insurance coverage for laid-off employees.

POSTAR COAL CO., INC.